No. 11,766

United States Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply Brief of Appellant to Brief on Behalf of Appellee American Potash & Chemical Corporation

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This particular appellee has filed a separate brief in reply to the opening of appellant, but inasmuch as various questions discussed in the brief of such appellee are also referred to and discussed in the brief of the British defendants and replied to in appellant's reply (referred to

herein as "Other Brief" or "O.B."), we hereby incorporate such reply to that of the British appellees as a part of this reply to the brief of American Potash & Chemical Corporation. We shall serve counsel for the latter appellee with copies of our reply to the brief of the British appellees so that they may be fully informed of the contents thereof.

In this reply we shall follow as closely as possible the sequence of the points raised by such appellee.

I.

AS TO THE CLAIM THAT A CIVIL ACTION FOR TREBLE DAMAGES UNDER THE ANTI-TRUST LAWS IS NOT BASED ON A CONSPIRACY.

A quick and concise reply is: The cause of action is the conspiracy. See authorities such as *Nash v. United States,* referred to in Point I of appellant's reply (O.B.) to the brief of the British appellees and the discussion therein of such point. We do not question the statement that a mere conspiracy, while constituting a cause of action, does not in itself permit a plaintiff to recover damages; there must be overt acts growing out of the conspiracy, from which overt acts plaintiff has suffered damages. The "cause of action" and the "right to recover" are separate and distinct, and there can be no actual recovery in money damages unless they both exist and in a treble damage action, such as the present, each depends on the other.

As said in *Northern Kentucky Telephone Co. v. Southern Bell Telephone, Etc.,* 73 F.(2), 333 (C.C.A. 6) (Cert. den. 55 S.C. 546), at page 334:

"The distinction urged between an action for a conspiracy and one for damages growing out of a conspiracy would seem to be a mere play upon words."

That was a civil treble damage action. We have fully discussed the *Foster & Kleiser* case in the "O.B." and respectfully refer to such discussion in reply to all that counsel say in their brief as to such citation.

II.

AS TO THE CLAIM THAT "A CONSPIRACY IN VIOLATION OF THE ANTI-TRUST LAW DOES NOT GIVE RISE TO EITHER A SUIT IN EQUITY OR AN ACTION BASED ON FRAUD.

We do not contend that a straight action at law for treble damages cannot be brought and maintained when within the period of the statute of limitations, or that every treble damage action is either a suit in equity or an action based on fraud. We do contend that in treble damage cases, as in various other classes of action, where fraud raises its ugly head, the doctrine of estoppel will hurry to the assistance of the wronged party and see that justice is done; estoppel, being an arm of equity, will move the whole case over to the equity side of the Court and do complete justice between the parties.

The late case of

United States v. Paramount Pictures, 68 S.Ct. 915,

illustrates such point. That was a suit by the Government to restrain violations of the Anti-trust Act and in discussing a certain order of the District Court, the Supreme Court stated in reference thereto (p. 925):

"* * * For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid

> —in order to rid the trade or commerce of all taint of the conspiracy. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 64 S.Ct. 805, 814, 88 L.Ed. 1024."

There is no reason why the equitable rule applied in *Holmberg v. Armbrecht* should not be applicable to treble damage actions. That the *Holmberg* case was on the equitable side of the Court was not because it was an action to recover the double liability of bank stock holders, but because of the *concealment* by Bache of his ownership of the stock in question.

On p. 397 of the Official Report of the *Holmberg* case (327 U.S. 392) the Court stated:

> "* * * If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under Sec. 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, *the alleged deception by Bache which is the basis of this suit.*" (Citing cases) (Italics ours)

The *Holmberg* case is not the only authority of our highest Court that holds State statutes of limitation are not applicable in Federal equity cases; the authorities cited in the *Holmberg* case are conclusive on this point.

Counsel cite the case of *Chattanooga Foundry etc. v. Atlanta,* but there was no fraud in that case, hence no reason for the equitable doctrine of estoppel to be applied.

There is no reason whatsoever why the rule of *Sears v. Rule,* cited in Subdivision II of the "O.B." (reported 27 Cal. 2d, 131) should not be applied to treble damage actions. There it is stated:

"Nevertheless, if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations." (Citing authorities)

Such is substantially the rule laid down in the *Holmberg* case. Natural justice and fair play should, and do, prevent a wrongdoer from raising the statute of limitations to cover and defend him from his iniquities. More and more courts of equity are applying their principles to relieve litigants from the harshness of purely legal principles.

We respectfully submit that no case could more strongly call for the application of the doctrine of estoppel than that presented here. Deceit, fraud and ruthlessness have destroyed appellant financially and to allow appellees to escape under the cloak of the statute of limitations would be a mockery of justice.

III.

AS TO THE CLAIM THAT THE THREE-YEAR STATUTE OF LIMITATIONS, SEC. 338, SUBD. 1, C.C.P. IS APPLICABLE.

Such claim is correct when restricted to actions at law for treble damages, but like the rule in the Federal Courts, evidence by the decision in the *Holmberg* case, where fraud and concealment exist to the extent of delaying the action until after the expiration of the statute, the statute is tolled until the discovery of the cause of action or until

such cause could have been discovered by the exercise of reasonable diligence (C.C.P. Sec. 338, subd. 4).

All authorities cited by counsel on p. 10 in support of their claim were straight actions at law for treble damages, and did not involve any of the equitable principles herein presented.

IV.

AS TO THE CLAIM THAT THE CAUSE OF ACTION PRESENTED HEREIN ACCRUED MORE THAN THREE YEARS BEFORE THE COMMENCEMENT OF THE ACTION AND WAS THEREFORE BARRED BY THE STATUTE.

Again counsel refer to the *Foster & Kleiser* case; that developed into a straight action at law for treble damages —hence the application of the three-year statute. As we have shown in our "O.B." all else appearing in the *Foster & Kleiser* opinion is pure dicta and not applicable herein.

In this subdivision counsel refer (p. 13) to the Little Placer Claim and to the fact that no damages could have resulted to appellant by the refusal of the Government to grant appellant a lease thereof. The reference to the Little Placer was to an overt act and did not constitute a cause of action for damages for the interference by appellees with appellant's application. This is an illustration of the error of the claims of appellees and the acquiesence therein by the lower Court, in considering each of such overt acts as a cause of action. Counsel allege that no damages are claimed re the Little Placer, but we submit that the allegation of the complaint for general damages is sufficient (Tr. p. 53, Par. 81). Par. 81 contains the allegation that appellant has been damaged, in a designated amount, resulting from all of the acts done and

performed by appellees and charged in the complaint. Such allegation is sufficient for this proceeding. In

National Etc. v. Kelling, 61 F.Supp. 76; and
Rivoli v. Loew's Etc., 7 F.R.D. 219,

it was held that general statements as to damages are sufficient in actions of this character.

On p. 14 counsel claim that Mr. Burnham, when he became suspicious, might have commenced an action for treble damages based on such suspicion, *and employed a bill of discovery to secure his evidence.* Such statement falls of its own weight, for in the first place, how could a complaint for treble damages be filed until the prospective plaintiff had actual knowledge of the cause of action, i.e., formation of the conspiracy, and secondly, can it be imagined for a moment that, even through the use of a bill of discovery or by deposition, the defendants so charged in such a situation would admit their wrongdoing? We strongly suspect that we would find the defendants withdrawing behind their constitutional immunity, inasmuch as if they admitted that they were guilty of such a conspiracy they would be subjecting themselves to a criminal prosecution under Secs. 1 and 2 of the Antitrust Act.

On p. 14 counsel also attempt to pass over the claim of the existence of a continuing conspiracy as urged in the "O.B." What we have had to say in reply to a like contention is set forth in Subd. VIII of the "O.B." and to which we refer.

V.

AS TO THE CLAIM THAT SEC. 338, SUBD. 4, C.C.P. IS NOT APPLICABLE.

We have discussed one phase of this in the preceding portion of this brief. However, counsel again refer to the *Foster & Kleiser* case and state that this Court in such opinion held that such statute was not applicable to a treble damage suit. Such statement goes far beyond the real holding of the opinion in the cited case and overlooks the fact that what was said in this connection was mere dicta on the part of the Court.

VI.

AS TO THE CLAIM THAT THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF FAILED TO PROVE THE CHARGE OF FRAUDULENT CONCEALMENT.

Under this heading are three subdivision. We shall reply to each separately.

1. As to the claim that appellees owed no duty to appellant to disclose to it the existence of the alleged conspiracy: Such claim is here immaterial in view of the fact that such conspiracy is admitted for the purposes of this motion, by the failure of appellees to deny such allegations. It is true that there may have been no absolute duty on the part of appellees to disclose to the appellant that they were guilty violators of the anti-trust laws, but that does not overcome the rule laid down in *Kimball v. P. G. & E.* and in *Pashley v. Pacific Electric Etc.*, cited on p. 16 of counsel's brief, that if parties are charged with such malefactions by the injured person and elect to

answer, they must, in making such answer, tell the truth; once electing to speak they must admit their wrongdoing, and their failure to do so constitutes fraud and concealment.

Here, aside from the first conversation with Mr. Zabriskie and Mr. Emlaw in 1929, the record shows that on October 19, 1937, in a conversation between Mr. Burnham and the same Mr. Emlaw and a Mr. Baker, both connected with appellees, Messrs. Emlaw and Baker denied that there was any connection or fraudulent action on the part of the American Potash & Chemical Corporation and the Pacific Coast Borax Company; this at a time when both companies were most active in their attempts to destroy appellant financially (Tr. p. 148. Also please see Mr. Burnham's affidavit, Tr. p. 121, particularly at p. 132). In addition, at Los Angeles, Mr. Colby, an attorney representing certain of appellees in a proceeding involving appellant, denied, when charged with anti-trust activities, that such existed.

Counsel claim that duty to disclose arises only if there is a confidential relationship between the parties. That, however, is not the rule, as an examination of the authorities cited on pp. 16 and 17 of counsel's brief will disclose. There were no confidential relations in *Kimball v. P. G. & E.*, supra, which finally settled the rule. Likewise, there were none in *Hanson v. Bear Film Co.*, cited p. 16.

2. As to the claim that appellant failed to properly allege fraudulent concealment: The allegations charging fraudulent concealment in the complaint are unanswered and therefore stand admitted, and the claim that "fraudu-

lent concealment must be of facts upon which the cause of action depends'' is answered by the fact that the complaint charges upon the 1929 conspiracy, the cause of action, and which allegations for the purposes of this proceeding are not denied and therefore remain admitted by this appellee. It is not true that the only fraudulent concealment was Mr. Zabriskie's denial. As shown in the preceding subdivision, the same applies to the statements of Emlaw and Baker made to Mr. Burnham on October 19, 1937. Furthermore, the allegations of the endeavors on the part of Mr. Burnham subsequent to November 1929 are shown in his affidavit appearing at Tr. pp. 133 to 156. Therein are alleged the various steps taken by Mr. Burnham to discover the reason for all that was happening to his company, and his inability to make the discovery of such 1929 conspiracy. No one could have been more active or could have put forth greater efforts to discover the truth of the situation; Mr. Burnham's affidavit discloses monumental efforts on his part to that end. All of the activities of all of the appellees reek with concealment of the conspiracy throughout the period referred to in the complaint.

3. As to the claim that ''There was no error in the District Court's ruling directing a verdict for the defendants'': Counsel cite the pre-trial order and in reply we refer to Subd. II of our ''O.B.'' where this point is thoroughly discussed.

Also, the Court did usurp the functions of the jury and erred in taking the case from the jury. **All of the testimony upon which the lower Court rested such action on its**

part was based upon that introduced as to the various overt acts—not one word of such testimony referred to the cause of action upon which the complaint was based, viz. the 1929 conspiracy. Mr. Burnham testified explicitly that he had no knowledge or belief in the existence of the 1929 conspiracy until the disclosure thereof through the Government proceedings in 1944 (see "O.B." Subd. II). Against this appellees introduced evidence surrounding the overt acts, not one bit of which evidence referred to the 1929 conspiracy. Therefore there was a direct contradiction between Mr. Burnham's testimony and that offered by appellees.

We contend (a) that none of the testimony offered by appellees concerned the 1929 conspiracy in any respect; (b) such evidence showed Mr. Burnham's constant endeavors to discover the true situation; and (c) that a real conflict existed between Mr. Burnham's testimony that he knew nothing of the conspiracy charged upon until the Government cases appeared, and appellees' testimony of such activities involving the overt acts. The real question presented was whether or not Mr. Burnham's activities so testified to indicated any knowledge of the 1929 conspiracy. That was the only question that could properly go to the jury based upon the allegations of the complaint and the testimony.

In the light of the foregoing we respectfully submit that there is no basis for the contention made by counsel in the first paragraph on p. 24.

For the reasons stated herein, as well as in the Conclusion set forth in our "O.B." we respectfully submit that the judgment of the lower Court should be reversed and the case sent back for trial on the merits.

Respectfully submitted,

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